

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EBAY INC.; and MICROSOFT
CORPORATION,

No. C 10-4947 CW

Plaintiffs,

v.

KELORA SYSTEMS, LLC,

Defendant.

CABELA'S INC.,

No. C 11-1398 CW

Plaintiff,

v.

KELORA SYSTEMS, LLC,

Defendant.

KELORA SYSTEMS, LLC,

No. C 11-1548 CW

Plaintiff,

v.

TARGET CORPORATION; OFFICEMAX
INCORPORATED; ROCKLER COMPANIES,
INC.; 1-800-FLOWERS.COM, INC.;
AMAZON.COM, INC.; DELL, INC.;
OFFICE DEPOT, INC.; NEWEGG INC.;
COSTCO WHOLESALE CORPORATION;
HEWLETT-PACKARD COMPANY;
CIRCUITCITY.COM INC; AUDIBLE,
INC.; and ZAPPOS.COM, INC.,

Defendants.

NEBRASKA FURNITURE MART, INC.,

Plaintiff,

v.

KELORA SYSTEMS, LLC,

Defendant.

No. C 11-2284 CW

ORDER DENYING IN
PART DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT WITHOUT
PREJUDICE AND
SETTING DISCOVERY
AND BRIEFING
SCHEDULE FOR
RENEWED MOTION FOR
SUMMARY JUDGMENT

AND ALL RELATED COUNTERCLAIMS

Plaintiffs and Counterclaim-Defendants eBay, Inc., Microsoft Corporation, Cabela's Inc. and Nebraska Furniture Mart, Inc., Defendants and Counterclaim-Plaintiffs Target Corporation, Office Max, Incorporated, Rockler Companies, Inc., 1-800-Flowers.com, Inc., Amazon.com, Inc., Dell, Inc., Office Depot, Inc., Newegg, Inc., Costco Wholesale Corporation, Hewlett-Packard Company, CircuitCity.com Inc., Audible, Inc. and Zappos.com, Inc. (collectively, Defendants) move for summary judgment on the claims filed against them by Defendant/Counterclaim-Plaintiff and Plaintiff/Counter-claim Defendant Kelora Systems, LLC (Kelora), based on arguments of non-infringement and invalidity of Kelora's U.S. Patent No. 6,275,821 ('821 patent) due to obviousness and broadening during re-examination.

Having considered the papers filed by the parties and their oral arguments, the Court DENIES without prejudice Defendants' motion for summary judgment to the extent that it argues that the '821 patent was invalid under 35 U.S.C. § 103 due to obviousness.

1 While it is true that expert testimony is not always required
2 for this inquiry, the Federal Circuit has also held that, in some
3 circumstances, expert testimony may be essential to assist the
4 Court in determining obviousness. See Wyers v. Master Lock Co.,
5 616 F.3d 1231, 1239, 1239 n.5 (Fed. Cir. 2010) ("KSR and our later
6 cases establish that the legal determination of obviousness may
7 include recourse to logic, judgment, and common sense, in lieu of
8 expert testimony," though in some cases, expert testimony may be
9 "essential"). The Court finds that, without the assistance of
10 expert testimony, Defendants have not met their burden to
11 demonstrate that "resubmission" was obvious at the time of
12 invention.

13 Defendants are granted leave to supplement their motion for
14 summary judgment. The parties are limited to addressing the
15 obviousness of "resubmission" and shall not repeat any other
16 arguments or facts already provided in their original filings.

17 The parties may refer to the exhibits submitted in connection
18 with their prior filings. Defendants may not submit any
19 additional evidence beyond an expert declaration and supporting
20 documents thereto, and Kelora may not submit additional evidence
21 beyond a rebuttal expert declaration and supporting documents
22 thereto, if Kelora desires to make such a submission. Defendants
23 shall disclose the identity and report of their expert witness
24 within fourteen days of the date of this order, and Kelora shall
25 disclose its rebuttal expert report, if any, within one week
26 thereafter. The parties shall complete expert discovery within
27 two weeks after the deadline for Kelora's disclosure.
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1 Defendants shall file their supplemental brief on their
2 motion for summary judgment, which may not exceed ten pages, by
3 January 13, 2012. Kelora shall file its opposition to Defendants'
4 renewed motion, if any, which may not exceed ten pages, by January
5 20, 2012. Defendants shall file their reply to Kelora's
6 opposition, if any, which may not exceed five pages, by January
7 25, 2012. The Court will decide the renewed motion on the papers.

8 The remaining issues raised by Defendants in their motion for
9 summary judgment are under submission.

10 IT IS SO ORDERED.

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12 Dated: 12/6/2011

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15 CLAUDIA WILKEN
16 United States District Judge
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